



OPEN GOVERNMENT TASK FORCE REPORT

NOVEMBER 2009



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PREFACE:

The purpose of the Open Government Task Force is to study and make recommendations on the creation of an administrative board to rule on complaints of violations regarding the Public Records Act (PRA) and the Open Public Meetings Act (OPMA).

The Attorney General's Office and the Auditor's Office created this Task Force to address growing concerns among governments and the public. State agencies and local governments face a logjam of citizen complaints, costly litigation over the PRA and the OPMA, and uncertainty regarding potential liability that may require payment of attorneys' fees, costs, and daily penalties. Citizens who are denied access to public records and public meetings have no choice other than to go to court, and lawsuits may take years to resolve and are costly. Going to court to enforce legal rights to access public records and public meetings is simply not an option for many citizens.

An efficient and inexpensive solution is needed to resolve complaints and provide greater access to public records and public meetings while reducing costs to governmental agencies and the public. Many states provide an independent administrative review process to resolve complaints without litigation. These states use administrative boards to offer services including mediation, dispute resolution, non-binding legal interpretations, investigation of potential violations, issuing final appealable rulings, offerings of legislative reform, and training public officials about their responsibilities under the law.

MEMBERSHIP

The Open Government Task Force was comprised of state and local elected officials, citizens, and representatives of organizations who have worked extensively on the issue. The Task Force was chaired by Attorney General Rob McKenna and State Auditor Brian Sonntag. The members appointed include:

Kelli Williams, King County
Jim Doherty, Municipal Research and Services Center
Judy Endejan, Graham and Dunn PC
Ruth Gordon, Jefferson County
Jerry Handfield, Secretary of State
John Hendrickson, Kenmore City Council
Mary Hunt, Douglas County
Rep. Chris Hurst, 31st District
Graham Johnson, Former Executive Director of the Public Disclosure Commission 1974-1993
Rep. Lynn Kessler, 24th District
Rep. Joel Kretz, 7th District
Mark Lindquist, Pierce County Prosecuting Attorney

Louis Mitchell, Bremerton School Board
Sen. Bob Morton, 7th District
Shirley Nixon, Citizen
Toby Nixon, Washington Coalition for Open Government
Bob Partlow, Citizen
Althea Paulson, Kitsap Regional Library
Kevin Phelps, Pierce County
Craig Ritchie, Ritchie Law Firm, PS
Rowland Thompson, Allied Daily Newspapers of Washington
Anna Jancewicz, Teamsters Local Union 117
Steve Boyer, Kitsap County Sheriff

The Task Force was staffed by **Assistant Attorney General Tim Ford**, **Deputy Chief of Staff Doug Cochran** (State Auditor's Office), and **Executive Assistant Elaine Ganga**.



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MATERIALS

The task force was provided materials for their review in advance of the meeting available on the Attorney General's website¹. Materials include but are not limited to an overview and purpose of the PRA and OPMA, a summary of select cases, Auditor's Report of OPMA concerns, 50 state survey and summary of enforcement processes, and written public comment.

OCTOBER 5, 2009 MEETING

The task force held its first meeting on October 5, 2009 in the Senate Rules Room of the Legislative Building in Olympia. TVW² recorded and televised the meeting. The meeting was opened by statements from Brian Sonntag and Rob McKenna to encourage the members to study and seek an effective way to access information without having to initiate litigation in court.

A brief overview of the PRA, the OPMA, their enforcement mechanism, and relevant cases were provided by Tim Ford. The *Yousoufian* case was of particular concern given its length of time over ten years and repeated appeals to the Washington State Supreme Court. Of particular note in the *Yousoufian* case is Justice James Johnson's quote in the September 22, 2009 hearing: "This has gone on and on in this case through the courts, my perspective is the courts are not solving the problem."

Discussion followed regarding concerns. Bob Partlow asked how many lawsuits are filed, and Brian Sonntag noted that there is no tracking mechanism but a lawsuit is the only recourse or a dispute is never resolved. Toby Nixon clarified that the lack of training leads to noncompliance, and that online training free of charge provided by the Attorney General's Office would make a huge difference. Additionally, Toby Nixon concludes an administrative [appeals] process could be used to foster training. Louis Mitchell would like to know which administrative processes of other states are more efficient, an appeal through a body governed by a commission or through an Attorney General's Office. Anna Jancewicz commented that offender requests have nearly doubled from 2007 to 2008 and that agency employees are affected by records requests. Training should also be for employees that are affected by these requests especially if they are harassing. Judy Endejan states there is a real need for something other than a lawsuit to compel compliance with the PRA. Citizens obtaining redacted records may still not be able to determine whether the actions of government were right. A different enforcement mechanism would benefit both parties because litigation is extremely expensive. However, it needs to have the confidence of the citizens that it is not just another agency protecting government. Graham Johnson indicated that the Public Disclosure Commission (PDC) is effective because it has enforcement authority to adopt rules under the Administrative Procedures Act. Advisory opinions, rules of general applicability, and interpretive statements or guidelines will eliminate confusion so that every issue doesn't have to be litigated. John Hendrickson noted that it isn't easy to find authority for guidance on disclosure and that even an elected council member may encounter difficulties to review public records in order to perform their official duties. Althea Paulson clarified that the Attorney General's Office has a lot of information on its website with general guidance and the model rules.

The task force heard a telephone presentation by Terry Mutchler, Executive Director of the Pennsylvania Office of Open Records with authority to oversee the Pennsylvania Right to Know Law. Her agency hears administrative complaints over denials of public records, not public meetings. They try to take a middle of the road approach in enforcing the law, but if there is a close call her agency interprets the law in favor of openness. Terry stated that it is critical to have an administrative oversight agency if a state is to be successful in ensuring open and accountable government.

1. <http://www.atg.wa.gov/OpenGovernment/TaskForce/Materials.aspx>.

2. <http://www.tvw.org/media/mediaplayer.cfm?eid=2009100066A&TYPE=V&CFID=9234089&CFTOKEN=2c4d25235b5c4ae3-2A875757-3048-349E-4E3A0E9474FD29FD&bhcp=1>

Terry Mutchler introduced the basics of the new Pennsylvania Right to Know law. If a Pennsylvania citizen files a Right to Know request with a government agency, the body has five business days to initially respond by disclosing the records or denying the records. It may invoke a 30 calendar day extension, but at the end of that time the agency must disclose the records or deny the request. The denial must contain certain information that includes notice that a requester may appeal to the Office of Open Records. The agency doesn't get a second bite at the apple because very rarely does an agency reverse itself.

The Office of Open Records will review a complaint if filed within 15 days of a denial. The Office of Open Records has the capability of obtaining more information from the agency denying the record, conducting a hearing, and reviewing the records privately (in camera). Decisions are made within 30 calendar days, and the decision is binding. The agency ordered to disclose may appeal to court. Terry stated "you do need an oversight board" and she anticipates that the volume of administrative appeals filed is going to be tremendous based on her experience in Pennsylvania where 830 appeals have been docketed since the beginning of the 2009. Connecticut averages between 800 and 1,000 requests/appeals each year. The Pennsylvania Office of Open Records has a staff of ten people which is rare compared to other states with a smaller staff. Six of Terry's staff are attorneys. Pennsylvania is unique because three serious cases of corruption brought about change of Pennsylvania law and creation of the oversight board. Indiana has a similar oversight agency with a staff of two people, Illinois has a staff of three, Connecticut has a staff of twenty-two, and Florida reviews their complaints through the Attorney General's Office and may pull in additional attorneys.

Terry Mutchler answered questions from members of the task force on several concerns.

A task force member asked what role the Office has for educating agencies and officials. Terry Mutchler stated the Pennsylvania Office of Open Records is required by law to have a website to disseminate information about the law, its decisions, forms, and other information such as how to request training from the Office. The Office offers training but there is no obligation on officials. Texas requires training of all officials. The Office has the discretion to issue advisory opinions outside of any case.

A task force member sought clarification on how the appeals process is initiated. Terry Mutchler stated that an agency possessing public records may seek an additional extension by asking the requester for more time than the 30 days. If the requester doesn't agree and the agency doesn't provide the records, then the request is deemed denied and an appeal may be initiated to the Office of Open Records within 15 days of the denial.

A task force member inquired how the determinations of the Office are enforced. Terry Mutchler answered that the Pennsylvania law does include penalties and fines up to \$1,500 for a civil penalty and \$500 per day for any day that the court says a record should be released. Only the court can find bad faith and impose a fine. The penalty is ultimately paid by the taxpayer and therefore may not be an incentive for the agency to disclose.

A task force member asked how the appeal process is managed. Terry Mutchler explained that a complaint is docketed when the office receives a copy of the request and anything provided from the agency. Pennsylvania law also requires a citizen to state the reasons why the record is public and refute an agency's denial. The Pennsylvania Right to Know Law doesn't trump other laws that provide exemptions. The Office must provide a final determination within 30 days unless the requester agrees to an extension. A better way to manage the tremendous case load is to give authority to the oversight board to extend the deadline without permission of the requester.

A single appeals officer manages the appeal and not a commission. A hearing is not really necessary and may be granted at the discretion of the appeals officer. The decision to grant a hearing is not appealable. A hearing is usually requested by the agency and may be appropriate for questions of fact in combination of an in camera review. However, the 30-day deadline doesn't change for the hearing unless the requester agrees. Where an agency states the record doesn't exist, the burden is on the agency to submit an affidavit that they made a good faith search and can't find the record.



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A task force member asked whether a public employee may enjoin disclosure of personal information. Terry Mutchler answered that an employee of an agency does not have an ability to enjoin disclosure before the Office of Open Records. The employee must make an assertion of security to the agency which is then argued to the Office.

A task force member asked how many cases have been appealed from the administrative level to court. Terry Mutchler answered that seventy cases out of 840 have been appealed from the Office to court. This workload affects the Office when a state agency appeals to court because the Office is named as a defendant. Washington State should not force its oversight board to be the defendant in appeals to court because of the drain on resources.

A task force member asked about the independence of her office. Terry Mutchler answered that the Pennsylvania Right to Know Law provides a six-year term for her position, and she may only be removed for cause. It is very critical for the board to be independent.

A task force member asked about whether penalties are payable to the requester for violations. Terry Mutchler answered that penalties are not payable to the requester but that penalties are rare and she isn't clear how they are paid. Attorney fees and costs are awarded to the requester when an agency acts in bad faith, and an agency may recover fees when an appeal is frivolous.

A task force member asked about public records retention laws. Terry Mutchler stated that retention laws are governed by a different agency. Retention is very important and Washington should look at its records laws, retention laws, and meetings laws all together.

A task force member asked about harassing or frivolous requests. Terry stated the Office doesn't have the ability to address frivolous requests for records. One requester filed over 200 requests between January and March. That agency concluded the requests were burdensome. Another agency determined two requests in a month are burdensome. Only a court may decide what is frivolous or burdensome.

A task force member asked how emails are treated. Terry Mutchler stated that Pennsylvania law treats email as a public record where it meets the definition as information regardless of form or characteristic which documents a transaction of the agency. Some emails are transitory and may be destroyed quickly. An email goes through the same analysis as a document in a different form.

A task force member inquired about police records. Terry Mutchler answered the administrative records of the Sheriff's Office, like a budget, are reviewed by the Office. However, law enforcement and investigative records are reviewed by a district attorney, not the Office. The Office doesn't have jurisdiction over the judiciary or the legislature.

A task force member asked about funding. Terry Mutchler answered that the Pennsylvania legislature sets an appropriation for the Office. Since the Office is independent, it makes a separate request which is rolled into the Governor's request. The Office has about a \$1.1 million dollar budget. Don't write a concept into the law that you are not willing to fund. Media coverage will drive up your volume of citizens who want to use the appeal process. Of 825 appeals, less than 15 are from the media.

Terry Mutchler restated some statistics. The Office upheld agencies in 276 appeals, and ordered records released in 165 appeals.

Terry Mutchler's presentation was concluded that the task force took a break.

After the break, the task force continued discussion. The task force reviewed the worksheet and how to complete it. The worksheet does not reflect the conclusions or recommendations of the task force but it is meant as a process to facilitate the study and deliberations of the group. The worksheet and discussion will assist with the drafting of a report.

The task force briefly discussed whether the OPMA should be enforced by an administrative oversight board, and considered the availability of resources, the taping of executive sessions, minutes and what goes into them. Interpretive guidelines of the administrative oversight board may assist with the prevention of many OPMA concerns. The issue of third party injunctive actions is discussed.

PUBLIC COMMENT

Written comments were submitted by the Breean Beggs with the Center for Justice in Spokane, and separately by David Koenig. Those materials are available on the Attorney General's website.

A few members of the public attended the meeting, and the following provided testimony: Ramsey Ramerman with the Public Records Exemptions Accountability Committee stated that the penalty structure should be changed, and that abusive requests should be addressed, and that any administrative appeal process should be encouraged if not mandatory; Kyle Stanners, the public records manager/officer from the City of Bellevue supports mandatory training for open government laws, and emphasized that most public records requests are fulfilled within five days, and that resources are critical to meet existing duties; Jason Mercier with the Washington Policy Center supports an administrative option and that it should not be exclusive but optional, and an optional approach could still incentivize using an administrative process by making the administrative option inexpensive and removing the potential award of penalties for individuals who don't choose the administrative process but file first in superior court; and Sarah Schacht with Knowledge as Power whose mission is to inform individuals who want to get involved in the legislative process and suggests the legislature's web services is a good example of managing requests that would reduce costs and improve transparency.

NOVEMBER 2, 2009 MEETING

The task force meets to discuss and approve by vote several recommendations based upon its discussion at the October 5, 2009 meeting. The task force finds:

- 1) The Public Records Act and Open Public Meetings Act provide rights to the public for access to public records and meetings. The purpose of these laws is to allow the public access to public records and meetings. The courts are not always the best method for enforcing these rights and may be extremely expensive and slow. The added costs and uncertain liability of agencies subject to litigation are a growing concern.
- 2) There is a critical need for an independent administrative oversight agency to enforce the Public Records Act and Open Public Meetings Act with the purpose of providing an inexpensive, expedited, and clear process for resolving disputes.
- 3) The independent oversight agency should have authority to adopt rules pursuant to the Administrative Procedures Act to provide clear guidelines for an appeal process, and to issue advisory opinions interpreting the laws to provide clarity on agency duties. The oversight agency should make this information available on its website with other relevant information. The oversight agency should submit an annual report to the legislature on its activities, and recommend legislative reform.
- 4) Training should be mandatory for designated agency officials for the Public Records Act and Open Public Meetings Act. It would greatly reduce the concern over litigation. The oversight agency should provide periodic training, and make training materials available free on its website.



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- 5) The independent oversight agency may be governed either by:
 - a) A single independent director appointed by the Governor who hires appeals officers to manage and decide appeals, and has a term set by law and may only be removed for cause, or
 - b) It may be governed by a commission.
- 6) The process for utilizing an appeal to an oversight agency should be expedited. The oversight agency should have a short period set by law to issue a final ruling on any docketed appeal, and a process for requesting immediate rulings on simple issues in less than the period set by law. The oversight agency should have discretion on granting any request for a hearing, and/or conduct a confidential in camera review.
- 7) The existing legal right to initiating an action under the Public Records Act in superior court applies to any person having been denied an opportunity to inspect or copy a public record, and also for an agency or its representative, or a person who is named in the record or to whom the record specifically pertains. RCW 42.56.540 – 550. That existing legal right should be extended for any appeal to an oversight agency by a person denied a record, an agency or its representative, or a person who is named in the record or to whom the record specifically pertains.
- 8) The costs for using the appeals process of the oversight agency should be minimal or none for filing an appeal, and there should be no award of attorney fees, costs, or penalties to a prevailing party at the administrative level.
- 9) A ruling by the oversight agency is binding on the parties, enforceable in court, and subject to an appeal and de novo review by a court of general jurisdiction. The oversight agency should not be named as a defendant in any appeal to superior court.
- 10) Use of the administrative appeals process of the oversight agency should be encouraged to resolve disputes. There may still be a need in emergencies or for other fundamentally apparent reasons to initiate a lawsuit in superior court rather than filing an administrative appeal. A requirement to exhaust an administrative appeal with an oversight agency prior to appealing in superior court would end an existing legal right of the people created by initiative to bring an action directly before an independently elected judge. Therefore a process that allows the option of filing a direct action in superior court should be retained.
- 11) Adequate funding is vital to allow any oversight agency to successfully perform its work. Funding should be from a dedicated source.

CONCLUSION

The Attorney General and State Auditor co-sponsored the Open Government Task Force to study the creation of an administrative board to enforce the PRA and the OPMA. The task force met twice and reviewed materials in Washington State regarding the concerns and problems of enforcing these laws. It was provided a summary of other state laws, and heard a presentation from the Executive Director of the Pennsylvania Office of Open Records which administratively enforces their public records laws. There was public comment received and considered by the task force. The task force considered a report with recommendations and approved the report and recommendations [with changes]. The legislature should enact these recommendations into law to provide transparency and accountability of government and to reduce costs to the taxpayer.